Sabah Berjaya Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO S-01-276 OF 1996
GOPAL SRI RAM, SITI NORMA YAAKOB AND MOKHTAR SIDIN JJCA
9 JUNE 1999

Revenue Law *— Income tax — Deduction — Donation made at direction of state government — No valuable consideration — Whether voluntary — Whether amounted to tax avoidance — Income Tax Act 1967 ss 44(6) & 140*

The appellant was one of the subsidiaries of the Sabah Foundation ('the Foundation'). Under the Sabah Income Tax Ordinance 1956, gifts of money made to the Foundation were tax deductible in the hands of the donor. By letter dated 28 December 1979, the State Ministry of Finance informed the subsidiaries of the Foundation of the government's wish that all surplus funds in the subsidiaries be donated to the Foundation. Upon receipt of the letter, the appellant's board of director resolved that its profit be donated to the Foundation and the practice of donating all its profits to the Foundation continued for the following eight years. The respondent raised tax assessments for the years 1980 through 1987, disallowing the sums donated by the appellant to the Foundation. The appellant's appeal to the Special Commissioner was dismissed on the grounds that: (i) the donations made by the appellant were not deductible as a gift under s 44(6) of the Income Tax Act 1967 ('the Act') because they were involuntary as they were made under the direction of the state government; and (ii) the making of the donations amounted to a tax avoidance which the respondent could disregard by reason of s 140(1) of the Act. The High Court upheld the decision of the Special Commissioners. The appellant appealed.

Held, allowing the appeal:

(1) The judge fell into error when he equated the expression 'voluntary' as meaning the absence of some external pressure upon the donor of a gift. In the context of the law of gift, the word 'voluntary' or 'voluntarily' describes a transaction unsupported by valuable consideration. The disposition by the appellant of its profits to the Foundation were made voluntarily because it did not receive any valuable consideration or material benefit in return. It follows that the payments in respect of which the respondent raised assessments fall squarely within s 44(6) of the Act and were therefore deductible in the appellant's hands in accordance with the terms of that provision (see p 153H–I).

(2) There was a payment that reduced the appellant's income in circumstances in which the Act by way of s 44(6) clearly affords a reduction in tax liability. The appellant here was not engaging in

tax avoidance. For it did not do anything which did not reduce its income or suffer a loss, nevertheless resulting in it obtaining a reduction in its liability to tax as if it had. Accordingly, this was a case to which s 140 of the Act apply (see p 155G–I).

[Bahasa Malaysia summary

Perayu adalah salah satu daripada subsidiari-subsidiari Yayasan Sabah ('Yayasan tersebut'). Di bawah Ordinan Cukai Pendapatan Sabah 1956, pemberian-pemberian berbentuk wang yang dibuat kepada Yayasan tersebut boleh mendapat potongan cukai dalam tangan penderma. Melalui surat bertarikh 28 Disember 1979, Kementerian Kewangan Negeri memberitahu subsidiari-subsidiari Yayasan tersebut akan kehendak kerajaan bahawa semua wang yang berlebihan di dalam subsidiari-subsidiari hendaklah didermakan kepada Yayasan tersebut. Apabila menerima surat tersebut, lembaga pengarah perayu memutuskan bahawa semua keuntungan-keuntungannya hendaklah diderma kepada Yayasan tersebut dan amalan menderma semua keuntungan-keuntungannya kepada Yayasan tersebut berterusan untuk lapan tahun yang berikutnya. Responden menimbulkan taksiran-taksiran cukai untuk tahun-tahun 1980 sehingga 1987, tidak membenarkan jumlah-jumlah yang diderma oleh perayu kepada Yayasan tersebut. Rayuan perayu kepada Pesuruhjaya Khas telah ditolak atas alasan-alasan bahawa: (i) derma yang dibuat oleh perayu tidak boleh mendapat potongan cukai sebagai pemberian di bawah s 44(6) Akta Cukai Pendapatan 1967 ('Akta tersebut') kerana ia bukannya secara sukarela memandangkan ia dibuat di bawah arahan kerajaan negeri; dan (ii) pemberian derma adalah sama seperti pengelakan cukai yang mana responden boleh tidak mengendahkan oleh kerana s 140(1) Akta tersebut. Mahkamah Tinggi mengesahkan keputusan Pesuruhjaya-pesuruhjaya Khas. Perayu merayu.

Diputuskan, membenarkan rayuan:

(1) Hakim membuat kesilapan apabila beliau menyamakan ungkapan 'sukarela' sebagai bermaksud ketiadaan sebarang tekanan luaran ke atas penderma pemberian. Di dalam konteks undang-undang pemberian, perkataan 'sukarela' atau 'dengan sukarelanya' menggambarkan suatu urus niaga yang tidak disokong oleh balasan berharga. Pelupusan oleh perayu akan keuntungan-keuntungannya kepada Yayasan tersebut adalah dibuat dengan sukarelanya kerana ia tidak menerima sebarang balasan berharga atau faedah kebendaan sebagai balasan. Maka, ini bererti bahawa pembayaran-pembayaran yang mana responden menimbulkan taksiran-taksiran adalah jatuh dengan tepatnya dalam s 44(6) Akta tersebut dan maka pihak perayu boleh mendapat potongan selaras dengan terma-terma peruntukan tersebut (lihat ms 153H–I).

(2) Terdapat pembayaran yang mengurangkan pendapatan perayu dalam keadaan-keadaan dalam mana Akta tersebut melalui s 44(6) dengan jelasnya memberikan suatu pengurangan dalam tangunggan cukai. Perayu di sini tidak melibatkan diri dalam pengelakan cukai. Ini adalah kerana ia tidak membuat apa-apa yang tidak mengurangkan pendapatannya atau mengalami kerugian, tetapi telah memperolehi suatu pengurangan dalam tanggunggan untuk cukai seolah-olah ia telah memperolehi pengurangan itu. Oleh sebab itu, ini adalah suatu kes yang mana s 140 Akta tersebut adalah terpakai (lihat ms 155G-I).]

Notes

For cases on deduction, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1796–1822.

Cases referred to

Commissioner of Inland Revenue v Challenge Corp Ltd [1986] STC 548 (refd)

Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin [1997] 2 MLJ 17 (refd)

Federal Commissioner of Taxation v McPhail (1968) 117 CLR 111 (refd)

Ho Kean v Kong Lai Soo [1974] 2 MLJ 63 (refd)

Leary v Federal Commissioner of Taxation (1980) 11 ATR 145 (refd)

Midland Bank Trust Co Ltd & Anor v Green & Anor [1981] 1 All ER 153 (refd)

Milroy v Lord (1862) 31 LJ Ch 798 (refd)

Plumptre's Marriage Settlement, Re; Underhill v Plumptre [1910] 1 Ch 609 (refd)

Pullan v Koe [1913] 1 Ch 9 (refd)

Legislation referred to

Income Tax Act 1967 ss 44(6), 140

Income Tax Act 1976 s 99 [NZ]

Sabah Income Tax Ordinance 1956

WSW Davidson (*Zaheeda Ariff* with him) (*Shelley Yap, Leong Tseu Chong Chia & Co*) for the appellant.

Salmah bt Kassim (*Raja Kamaruzzaman Raja Musa* with her) Legal officer for the Inland Revenue Board Malaysia.

Cur Adv Vult

Gopal Sri Ram JCA: The appellant is a private limited company. It is one of several wholly owned subsidiaries of the Yayasan Sabah or the Sabah Foundation ('the Foundation'). The respondent is the Director General of Inland Revenue.

In 1966, the Foundation was approved as an institution of a public character under the provisions of the Sabah Income Tax Ordinance 1956 ('the Ordinance'). That meant that gifts of money made to the Foundation were tax deductible in the hands of the donor. Later, when Parliament enacted the Income Tax Act 1967 ('the Act'), it repealed the Ordinance. But the approval that the Foundation received under the Ordinance remained intact.

Between 1979 and 1985, the Chief Minister of the State of Sabah was the chairman of the Foundation as well as the chairman of the appellant. During that period, there was written a letter from the State Ministry of Finance to the managing director of the group of companies that were the subsidiaries of the Foundation. It is dated 28 December 1979. It is an important document from the respondent's point of view. The learned judge produced it in his judgment. I shall do likewise. In essence, this is what it says:

> The Managing Director,
> Sabah Foundation Group of Companies
> Sabah Foundation Headquarters, Kota Kinabalu.
>
> Tuan,
>
> *Donation to Sabah Foundation*
>
> I refer to discussion with the Chief Minister this morning and confirm that it is Government's wish that all surplus funds in the subsidiary companies of the Sabah Foundation be donated to the Sabah Foundation.
>
> The tax position of the subsidiary companies was also discussed this morning, and I am to state that the Government will provide all necessary assistance in obtaining tax relief or exemption for the subsidiary companies and ensure that the subsidiary companies their Directors and Officers are adequately protected as a result of the companies making the donations in compliance with Government's wish.

Immediately upon receipt of this letter the appellant's board of directors held a meeting. It was chaired by the then Chief Minister of Sabah. The board having noted that the appellant's profit for the year was estimated at RM8m resolved that the whole of that sum be donated to the Foundation. The practice of the appellant donating all its profits to the Foundation continued for the following eight years. For two of the eight years, the appellant donated sums that were slightly in excess of its declared profits. This was occasioned by the fact that the actual profit made for those two years fell somewhat short of the projected figure. But, as will appear later in this judgment, nothing turns upon the overpayment.

Later, the respondent raised tax assessments for the years 1980 through 1987, disallowing the sums donated by the appellant to the Foundation. The appellant being dissatisfied with these assessments appealed to the Special Commissioners. The Commissioners dismissed the appeal and upheld the assessments in question. Upon the appellant taking the matter further, the Special Commissioners stated a case to the High Court in which they set out their reasons for making their deciding order. Although the

A Special Commissioners found against the appellant on seven points, these may be quite safely be condensed into two broad grounds and may be summarized as follows.

First, that each of the donations made by the appellant to the Foundation were not deductible as a gift under s 44(6) of the Act because
B they were involuntary as: (i) they were made under the direction of the State Government and not voluntarily by the appellant; (ii) they were made pursuant to a contractual obligation; and (iii) the appellant had in return obtained a material advantage in return for the gift. In coming to these findings, the Special Commissioners lent much weight to the fact that the appellant had, on those two occasions I spoke of a moment ago, given away
C more than it had. The second reason advanced by the Commissioners was that the making of the donations amounted to a tax avoidance which the respondent could disregard, and had rightly disregarded, by reason of s 140(1) of the Act.

At the appeal before the High Court, the learned judge upheld the
D deciding order of the Special Commissioners on only one ground. He held that the donations by the appellant to the Foundation were not a 'gift' within s 44(6) of the Act because they were involuntary in the sense that they were the product of compulsion. He however rejected all the other reasons advanced by the Special Commissioners for holding that there was no gift. In view of his conclusion on the first point, the learned judge found
E it unnecessary to deal with the argument in relation to s 140 of the Act. It is against the refusal of the High Court to set aside the assessments in question that the present appeal has been brought.

Before this court the appellant puts its case under two heads of argument. First, that the Special Commissioners and the learned judge
F were wrong in law in holding that there had not been a gift within s 44(6) of the Act. Second, that the Special Commissioners were wrong in law in holding that the respondent was entitled to disregard the payments by the appellant to the Foundation as a tax avoidance under s 140 of the Act. Before I address each of these arguments, there is one matter that calls for comment.

G

The respondent has not, however, sought to argue that the judgment appealed against ought to be upheld on the other grounds that found favour with the Commissioners but not with the learned judge. It was certainly open for him to have done so by giving the requisite notice since the points in issue were live in the sense that they had not been abandoned by the
H respondent in the proceedings before the High Court. See *Ho Kean v Kong Lai Soo* [1974] 2 MLJ 63; *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17. In any event, the respondent did not seek to argue before us that the learned judge ought to be upheld on other grounds. This omission of the respondent has the consequence that this court is bound to accept as correct the rejection by the learned judge of the
I other grounds relied upon by the Special Commissioners in support of their conclusion.

But I must say at once in fairness to the learned judge that I am entirely in agreement with his reasons for concluding that the Special Commissioners had erred in law when they held that the appellant had acted under a contractual obligation and that it had obtained a material advantage when making the payments in question to the Foundation.

I will now deal with the two heads argument advanced by the appellant.

First argument: were the payments gifts?

In order to appreciate the rival contentions on the point it is necessary to hearken to the relevant statutory provision. It is, as I have earlier said, s 44(6) of the Act. And it reads as follows:

> (6) There shall be deducted pursuant to this subsection from the aggregate income of a person for the relevant year reduced by any deduction falling to be made for that year pursuant to sub-s (2) or Schedule 4, 4A or 4B, an amount equal to any *gift of money* made by him in the basis year for that year to the Government, a State Government, a local authority or an institution or organisation approved for the purposes of this section by the Director General on the application of the institution or organisation concerned... (Emphasis added.)

The appellant's case as put by Mr Davidson to us and to the learned judge is that the payment over by the appellant of all its profits to the Foundation was a gift of money within the terms of the foregoing subsection. The argument is that the appellant is therefore entitled to deduct these sums from its aggregate income for the eight years in question. In rejecting this contention, both the Special Commissioners and the learned judge purported to apply passages in the judgments of two Australian cases upon the parallel provision in that jurisdiction. The first of these is *Federal Commissioner of Taxation v McPhail* (1968) 117 CLR 111, where at p 116, Owen J, said:

> But it is, I think, clear that to constitute a 'gift', it must appear that the property transferred was transferred *voluntarily* and not as the result of a contractual obligation to transfer it and that no advantage of a material character was received by the transferor by way of return. (Emphasis added.)

The other is *Leary v Federal Commissioner of Taxation* (1980) 11 ATR 145, where Bowen CJ, after quoting the foregoing passage in the judgment of Owen J, in *McPhail* went on to say this:

> In his statement his Honour was mentioning what was appropriate to the facts before him. He was not putting forward a test to be used as a substitute for the words of the section. *It seems that a payment may be regarded as voluntary though made under a sense of moral obligation, but will not generally be regarded as voluntary if made under an obligation imposed by law, whether under contract or otherwise.* Where payment is made in pursuance of a contract but is not gratuitous, the person making the payment may fail to obtain the deduction under para 78(1)(a) in any event. (Emphasis added.)

A The approach of the learned judge to the issue at hand, guided as it was by what was said in the above-quoted cases, appears from three observations he made in a passage in his judgment. They appear at pp 30–31 of the record of appeal. He first said:

> B What clinched the donation, or, in the words of the witness for the appellant, 'started it all' was this letter of the Ministry of Finance which came as a result of a meeting of the Sabah Foundation managing director and the Chief Minister and it cannot be true then that the advice of the appellant's tax consultants was the deciding factor for giving the donations. Given the evidence, the Special Commissioners were amply justified in concluding that the appellant was compelled to make the payments.

C A little later he expressed the view that the evidence before the Commissioners pointed to the fact that 'the appellant was being dictated to rather than the appellant acting on its own volition and a decision to make donation was a foregone conclusion already expressed in the said letter of the Ministry of Finance.'

D And thirdly the learned judge said that he was of 'the same view of the Special Commissioners that the donations were not voluntary. It was not the Appellant who decided on the donations thus failing to meet the criteria of 'gift' which I had earlier referred to'.

It is thus abundantly clear from these comments of the learned judge that he equated the expression 'voluntarily' appearing in the Australian E decisions earlier referred to as meaning the absence of some external pressure upon the donor of a gift. In my judgment, the learned judge fell into error in adopting the approach he did.

In the context of the law of gifts which, for historical reasons, falls within the scope of equity jurisprudence, when the word 'voluntary' or F 'voluntarily' is employed, it is to describe a transaction unsupported by valuable consideration. It is derived from the word 'volunteer', meaning a person who has given no valuable consideration for a trust or settlement. It has no relation whatsoever to do with gifts being made in consequence of illegitimate pressure being brought to bear upon the disponor. Involuntariness in the latter context goes to vitiate free consent.

G Thus, when their Honours in the Australian cases, relied upon by the Special Commissioners and the learned judge, used the expression 'voluntary', they did so in order to draw a distinction between transactions that were supported by valuable consideration and those that were not. They were not speaking of the making over of money or property by a H person acting under pressure. That this is indeed the case is made amply clear from the following passages in the judgment of Bowen CJ in *Leary v Federal Commissioner of Taxation* (at pp 159–160 of the report) which was not quoted either by the Special Commissioners or the learned judge:

> I The ordinary notion of gift and 'gift' in its technical meaning have common features: a transfer of a beneficial interest in property by way of benefaction, and an absence of a pecuniary or proprietary benefit passing to the transferor by way of return. But the relevant circumstances in which these indicia may

be found are more narrowly confined when the enquiry is as to a gift in the technical sense than when the enquiry is as to a gift according to ordinary notions. The former enquiry is narrower in scope for it is more confined in its purpose. Its purpose is to ascertain whether a beneficial interest in property has been transferred by a mode which falls within the classification of gift. The intention of the transferor and transferee as to the ownership of the beneficial interest and the form of its transfer exhaust the matters for investigation as to the divesting and investing of the interest, and the absence of consideration passing from the transferee to the transferor serves to distinguish a gift from other modes of transferring property.

But an enquiry into the making of a gift according to ordinary notions requires reference to wider circumstances. In the first place, it is relevant to enquire as to the return (if any) which a disponor seeks and receives by disposing of the relevant property. The ordinary notions of a gift do not pay much regard to the difference between a return to a disponor which he receives as consideration under a contract and a return which is furnished under some other arrangement or understanding; nor is it of great importance that the return does not come directly from a disponee, but indirectly. It will always be of significance that a disponor has received from a disponee, either directly or indirectly, the return sought for making the disposition.

Secondly, it is relevant to enquire whether the disponee is, to the knowledge of the disponor, free to enjoy without burden the property disposed of; or whether, to the knowledge of the disponor, the taking of that property under the disposition is the occasion and reason for incurring a liability. If the disponor is aware that the receipt of the property by the disponee will impose a liability upon the latter, the disposition may be seen not to be way of benefaction. And as Dixon J said in *Collector of Imposts (Vic) v Cuming Campbell Investments Pty Ltd* (1940) 63 CLR 619 at p 642, a transfer by way of benefaction is the 'essential idea' of a gift. No doubt much depends upon a comparison between the property taken and the liability incurred. It is of lesser significance that the liability is incurred under an arrangement or understanding with someone other than the disponor, or that it is to be discharged out of assets other than the property received.

Thirdly, and most importantly, if the disponor is moved to dispose of his property, not to confer a benefaction on the disponee, but to acquire a pecuniary or proprietary benefit for himself, his disposition of that property with the object of effecting that result denies an essential characteristic of a gift according to ordinary notions; and this will be so notwithstanding that the disposition is made for the immediate purpose, and has the immediate effect, of vesting that property in the disponee. Of course, if the purposes of the disposition are to confer pecuniary and proprietary benefits upon both the disponor and the disponee, it would have to appear that the purpose of conferring such a benefit upon the disponee is dominant before a gift according to ordinary notions is established. It is in this enquiry that the first two considerations are useful, for in truth a return sought by the disponor and his knowledge of a liability incurred by the disponee speak to the purpose of the disposition: the return sought by a disponor, and his knowledge of the measure of the benefit to be taken by the disponee, are relevant in ascertaining whether benefaction is the purpose of the disposition. *The feelings of the disponor towards the disponee are not in issue. Rather the enquiry relates to the pecuniary and proprietary benefits which in all the circumstances the disponor is moved to confer and confers on the disponee, and to the pecuniary and proprietary benefits which in all the circumstances the disponor seeks to obtain and obtains by the disposition.* In the light of these enquiries, the question whether benefaction is

A the motive of the disponor and the purpose of the disposition falls to be determined — not according to an absolute standard but as a matter of degree. Once the technical meaning of gift is left behind, the classification of a disposition as a gift comes, as Dixon J observed, to 'depend upon matters of degree and perhaps to compel an inquiry into purpose; *Collector of Imposts (Vic) v Curning Campbell Investments Pty Ltd*, supra, at p 642. (Emphasis
B added.)

The true principle that governs the subject at hand may, I think, emerge by tracing its origin.

Traditionally, courts of equity have declined to enforce an incomplete trust or other settlement at the instance of one who has not given valuable
C consideration. See *Re Plumptre's Marriage Settlement; Underhill v Plumptre* [1910] 1 Ch 609. This is sometimes referred to as the rule in *Milroy v Lord* (1862) 31 LJ Ch 798, an authority for a more important proposition that has no relevance to the present instance. What equity regards as valuable consideration (as opposed to good consideration) is set out at p 127 of the
D 28th Ed of *Snell's Principles of Equity*:

> Lawful considerations are either —
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> (i) meritorious considerations (sometimes called good considerations), being considerations of blood and natural affection, or of generosity and moral duty; or
>
> E (ii) valuable considerations, such as money, money's worth, or marriage which the law esteems an equivalent for money.
>
> *A settlement supported only by the former kind of consideration is regarded as voluntary.* (Emphasis added.)

I may add that there is an observation upon the expressions 'valuable
F consideration' and 'purchaser' in the speech of Lord Wilberforce in *Midland Bank Trust Co Ltd & Anor v Green & Anor* [1981] 1 All ER 153, which, although made in the context of the English real property legislation is of much assistance upon the subject.

Since consideration in the eyes of equity is either money, money's worth or marriage, it follows that a transaction under which property is
G transferred without valuable consideration is a gift. By contrast, equity regards one who provides valuable consideration as a purchaser. See *Pullan v Koe* [1913] 1 Ch 9.

So much for the governing principle. Returning to the present instance, it is clear that both the Special Commissioners and the learned judge asked
H themselves the wrong question when coming to the conclusion that the payment by the appellant to the Foundation was not a gift within s 44(6) of the Act. In my judgment, the disposition by the appellant of its profits to the Foundation was made on each of the occasions in issue voluntarily because, as found by the learned judge, it did not receive any valuable consideration or material benefit in return.

I It follows that the payments in respect of which the respondent raised assessments fall squarely within s 44(6) of the Act and are therefore deductible in the appellant's hands in accordance with the terms of that provision. That brings me to the second point in the case.

Second argument: Tax avoidance

Section 140 of the Act is a comprehensive provision that enables the respondent to disregard any transaction which directly or indirectly has the effect of avoiding the incidence of tax. Although it has several sub-provisions, it is the first subsection that is relevant for present purposes. It reads:

> 140 (1) The Director General, where he has reason to believe that any transaction has the direct or indirect effect of —
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> (a) altering the incidence of tax which is payable or suffered by or which would otherwise have been payable or suffered by any person;
>
> (b) relieving any person from any liability which has arisen or which would otherwise have arisen to pay tax or to make a return;
>
> (c) evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by this Act; or
>
> (d) hindering or preventing the operation of this Act in any respect,
>
> may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the transaction and make such adjustments as he thinks fit with a view to counter-acting the whole or any part of any such direct or indirect effect of the transaction.

The section is not sui generis. It has parallels in other jurisdictions where it has received judicial consideration. Of the cases that have dealt with its equipollent, *Commissioner of Inland Revenue v Challenge Corp Ltd* [1986] STC 548 is the most notable. It is a decision of the Privy Council on an appeal from New Zealand. The Special Commissioners referred to it in their deciding order. The Judicial Committee had before it, in that case, s 99 of the Income Tax Act 1976 of New Zealand. It is a provision that is in pari materia with s 140 of the Act.

Lord Templeman, when delivering the majority opinion of the Board, drew a distinction between tax evasion, tax avoidance and tax mitigation. It is only the first two that fall within the purview of the statute: the last does not. In the course of delivering the advice of the Board on behalf of the majority, his Lordship said (at p 554 of the report):

> Tax evasion also can be dismissed. Evasion occurs when the commissioner is not informed of all the facts relevant to an assessment of tax. Innocent evasion may lead, to a reassessment. Fraudulent evasion may lead to a criminal prosecution as well as reassessment. In the present case Challenge fulfilled their duty to inform the commissioner of all the relevant facts.
>
> The material distinction in the present case is between tax mitigation and tax avoidance. A taxpayer has always been free to mitigate his liability to tax. In the oft quoted words of Lord Tomlin in *IRC v Duke of Westminster* [1936] AC 1 at p 19: 'Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Act is less than it otherwise would be'. In that case however the distinction between tax mitigation and tax avoidance was neither considered nor implied.
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> Income tax is mitigated by a taxpayer who reduces his income or incurs expenditure in circumstances which reduce his assessable income or entitle

him to reduction in his tax liability. Section 99 does not apply to tax mitigation because the taxpayer's tax advantage is not derived from an arrangement but from the reduction of income which he accepts or the expenditure which he incurs.

Thus when a taxpayer executes a covenant and makes a payment under the covenant he reduces his income. If the covenant exceeds six years and satisfies certain other conditions the reduction in income reduces the assessable income of the taxpayer. The tax advantage results from the payment under the covenant.

When a taxpayer makes a settlement, he deprives himself of the capital which is a source of income and thereby reduces his income. If the settlement is irrevocable and satisfies certain other conditions the reduction in income reduces the assessable income of the taxpayer. The tax advantage results from the reduction of income.

Where a taxpayer pays a premium on a qualifying insurance policy, he incurs expenditure. The tax statute entitled the taxpayer to reduction of tax liability. The tax advantage results from the expenditure on the premium.

A taxpayer may incur expense on export business or incur capital or other expenditure which by statute entitles the taxpayer to a reduction of his tax liability. The tax advantages result from the expenditure for which Parliament grants specific tax relief.

When a member of a specified group of companies sustains a loss, s 191 allows the loss to reduce the assessable income of other members of the group. The tax advantage results from the loss sustained by one member of the group and suffered by the whole group.

Section 99 does not apply to tax mitigation where the taxpayer obtains a tax advantage by reducing his income or by incurring expenditure in circumstances in which the taxing statute affords a reduction in tax liability.

Section 99 does apply to tax avoidance. Income tax is avoided and a tax advantage is derived from an arrangement when the taxpayer reduces his liability to tax without involving him in the loss or expenditure which entitles him to that reduction. The taxpayer engaged in tax avoidance does not reduce his income or suffer a loss or incur expenditure but nevertheless obtains a reduction in his liability to tax as if he had.

In the present case the appellant did not pretend to donate its entire profit to the Foundation. On the evidence there was an actual donation. So, no question of tax evasion arises. That is probably why the respondent never raised a case of evasion against the appellant at any stage.

The only case raised by the respondent against the appellant was one of tax avoidance. But, as in the case before the Privy Council, here too there was a payment that reduced the appellant's income in circumstances in which the Act by way of s 44(6) clearly affords a reduction in tax liability. The appellant here was not engaging in tax avoidance. For, it did not do anything which did not reduce its income or suffer a loss, nevertheless resulting in it obtaining a reduction in its liability to tax as if it had. Accordingly in my judgment this is not a case to which s 140 of the Act applies.

For the reasons already given, I would allow the appeal and set aside the assessments raised by the respondent for the years 1980 through 1987. The

sums set out in those assessments shall stand as deductions from the appellant's income for the years in question. The respondent must bear the costs of this appeal and those incurred before the High Court.

My learned sister Siti Norma Yaakob JCA and my learned brother Mokhtar Sidin JCA have seen this judgment in draft and agree with the reasoning and the conclusions therein.

Appeal allowed.

Reported by Jafisah Jaafar